83-1548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRANK KUSTINA,

Appellant,

v.

THE CITY OF SEATTLE,
and THE HISTORIC SEATTLE PRESERVATION
and DEVELOPMENT AUTHORITY,

Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK KUSTINA
5201 Ballard Ave N.W.
Seattle, WA 98107
206-789-2155
Appellant Pro se

QUESTIONS PRESENTED

1. Did the procedure whereby a certificate of approval was issued for siting and remodeling the houses moved into the landmark commercially zoned district patently, clearly and irrefutably demonstrate the absence of notice and opportunity to be heard required by courts as a matter of constitutional necessity?

2. Does RCW 42.30.060 (commonly referred to as the Washington State Open Meetings Act) withdraw from the courts of the State of Washington the jurisdiction, authority and power to give effect to facts used and relied upon in making the underlying judgment involving the September 14, 1976 ratification herein in question?

3. Did the lower federal courts err in holding that the doctrine of res judicata precluded litigation of twelve of the fifteen claims?

4. Did the District Court have original jurisdiction to provide a remedy for the constitutional deprivations alleged in the first eleven claims and claim fifteen of the complaint?

5. Is the imposition and or time of demand for and collection of filing fees in the Washington State courts, a condition precedent to access and action upon a lawsuit, appeal, or review involving alleged deprivation of state or federal constitutional guarantees, unconstitutional as violative of petition, due process and equal protection guarantees in Art. 1, sections 2, 3, 4, and 32 of the Constitution of Washington and the First, Fifth and Fourteenth Amendments to the United States Constitution?*

6. Is the imposition and or time of demand for the collection of filing fees in the federal courts below and this Court, a condition precedent to acting upon a lawsuit, appeal, or petition for a writ of certiorari involving alleged deprivation of federal constitutional guarantees, unconstitutional as violative of petition, due process and equal protection guarantees in the First and Fifth Amendments to the United States Constitution?*

---

* 28 U.S.C. 2403(a)(b) may be applicable. The Solicitor General and Washington Attorney General have been served with a copy of this petition.

TABLE OF CONTENTS

CITATIONS

CASES — PAGE

TREATISE/TEXTBOOK:

OPINIONS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRANK KUSTINA,

Appellant,

v.

THE CITY OF SEATTLE,
and THE HISTORIC SEATTLE PRESERVATION
and DEVELOPMENT AUTHORITY,

Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinions of the King County, Washington Superior Court, The Court of Appeals of the State of Washington, United States District Court for Western Washington at Seattle Orders dated August 11, 1980, June 10, 1981, December 10, 1981, October 1, 1982, November 24, 1982 and Ninth Circuit Court Orders dated December 14, 1983 and denial of rehearing dated February 2, 1984 are reproduced in the Appendix.

JURISDICTION

The statutory basis for federal jurisdiction of this civil case in the District Court is 28 U.S.C. 1343(1)(2)(3)(4), 42 U.S.C. 1983 and 42 U.S.C. 1985. This petition is being docketed in this Court within 60 days from the denial of rehearing below dated February 2, 1984 of the Memorandum dated December 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES

Article IV, United States Constitution:

> Sec. 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, United States Constitution:

> Sec. 1 . . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Revised Code of Washington (RCW) 42.30.010: (Open Public Meetings Act)

42.30.010 Legislative declaration. The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. (1971 ex c.c. 250 sec. 1)

Revised Code of Washington (RCW) 42.30.040: (Open Public Meetings Act)

42.30.040 Conditions to attendance not to be required. A member of the public shall not be required, as a condition to attendance at a meeting of a governing body, to register his name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his attendance. (1971 ex.s. c 250 sec. 4)

Revised Code of Washington(RCW) 42.30.060: (Open Public Meetings Act)

4.30.060 Ordinances, rules, resolutions, regulations, etc., to be adopted at public meetings—Notice. No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this section shall be null and void.

Legislative History

Added by Laws 1st Ex Sess 1971 ch 250 sec. 6.

28 U.S.C. 1254, 1343, 1911, 1913, 1914 reproduced in Appendix. 28 U.S.C. 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. 1739. State and Territorial nonjudicial records; full faith and credit

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it

shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken.

42 U.S.C. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1985 reproduced in Appendix

16 U.S.C. 470(Public Law 89-665 as amended by Public Laws 91-243, 93-95, 94-422, 94-458, 96-199, 96-244, and 96-515) cited as the "National Historic Preservation Act" is reproduced in the appendix hereto.

Seattle Ordinance 105462 creating the Ballard Avenue Landmark District is reproduced in the appendix hereto.

ByLaws and Procedures for the Ballard Avenue Landmarks Board is reproduced in the appendix hereto.

STATEMENT OF THE CASE

The matter in dispute in the first eleven claims and in the reasoning in part dismissing claim fifteen centers around issuance of a certificate of approval and a building permit for the siting and relocation of two wooden houses into the Ballard Avenue Landmark District in Seattle, Washington. Seattle Ordinance 105462 creating the Ballard Avenue Landmark District in section 5 titled "Approval of changes to buildings, structures and other visible property within Ballard Avenue Landmark District" sets out the procedure for issuance of a certificate of approval.

Appellant filed suit on August 23, 1977 in King County, Washington Superior Court at Seattle to abate as a nuisance the structure(s) sited and remodeled in the landmark district

pursuant to a procedure spelled out by Washington State statutes and used and followed by King County Superior Court in other cases. At a summary judgment proceeding the King County Superior Court dismissed the case with prejudice. The Superior Court Judge found that appellant failed to set forth any claim upon which relief could be granted, that there was no issue of material fact and that plaintiff's action was brought beyond the twenty day time required by law. It also found that appellant had not alleged, identified or sustained any legal injury, was not aggrieved and lacked standing, and that his claims predicated on Seattle Ordinance 105462 were without merit as a matter of law. The Washington State Court of Appeals affirmed the dismissal. The Washington State Supreme Court denied appellant's petition for review.

Appellant unsuccessfully sought to challenge the appellee's issuance of a certificate of approval and subsequent building permit for siting and remodeling the two houses brought into the district as violative of his constitutional rights and Seattle Ordinance 105462 section 5(a) issuance mandate ". . . . except pursuant to a Certificate of Approval issued by the Director pursuant to this ordinance". It should be kept in mind that under the ordinance such issuance by the Director is solely and only a clerical act and not quasi-legislative or quasi-judicial. That limitation appellant contends was not recognized by the courts of the State of Washington. Ordinance 105462 section 5(c) grants jurisdiction or the opportunity to act first on "all" such applications for a certificate of approval to "the District Board or the Landmarks Preservation Board". Due to alleged misconduct by appellee, which amounted to flagrant and unlawful abuse of power, neither of those Boards considered the application in accordance with the specific ordinance wording and procedures spelled out in the ordinance for the consideration of "all" applications. Instead, as appellant alleged in his state complaint, the Director of the Seattle Department of Community Development usurped the ordinance language for processing of "all" applications and took it upon himself to without prior notice decide upon and sign a certificate of approval on June 3, 1976.

Appellant contended from the legislative history of Seattle Ordinance 105462 and the text of section 5(d) of that ordinance that the Director has only a clerical role under the ordinance since he or she is directed what and when to do things, and he or she lacks authority to unilaterally decide anything under the ordinance. The ordinance was enacted to specifically take any such power away from a City Hall official that might be exercised under other local historic preservation ordinances and place it in the local district board. The record evidences the correctness of appellant's position and understanding (See Exhibits A-F attached to District Court Docket Entry #19). In spite of the law and the fact, the Washington State Court of Appeals found the above procedure by the Director, "even assuming the validity of plaintiff's claim", was improper and none-the-less ratified by the Ballard Avenue Landmark District Board's "endorsement" subsequently on September 14, 1976 of the June 3, 1976 signing (See Docket Entry 7 Exhibit A attached to Affidavit of John Turnbull). Appellant received no notice of the September 14th meeting or consideration of a certificate of approval for siting the houses as an agenda item of that meeting either. Such defect is pivotal to resolution of this appeal. The absence of such notice and or agenda if any exists of the June 3 and September 14 action upon the certificate of approval and the absence of the opportunity for appellant to speak at a public meeting and hear what others have to say and respond to what is said as part of the dialog as well as observe the action of the board is the 42 U.S.C. 1983 violation addressed in the federal complaint, and to which this appeal is directed.

Such occurrence takes on added significance and meaning when it is recalled that appellant signed a petition directed to the Director to convene a board meeting to consider the application. The petition was signed, delivered, and accepted in July 1976. Appellee thereafter improperly took steps to bring about or defeat board consideration.

Notice should also be taken by the Court of the September 14th minutes which appellee presented as conclusive of the granting of a certificate of approval, and which the state courts agreed in ruling that such made the matter "moot". Yet those

minutes are devoid, for a reason other than a clerical error, of any mention at the September 14th meeting of discussion evidencing any views questioning the siting. Such is evidence of a patent defect in the siting process since some of those signators, including appellant, to the petition requesting that the board, rather than the Director, be convened to consider the application could have been expected to express their views or question at the ordinance specified public meeting such action. Is the explanation for the absence of such opposing views or questioning due to the fact that others too had no prior notice of any consideration at the September 14th meeting on an application for a certificate of approval for the houses or that such consideration was on the agenda? The answer as to why no notice was given as required by Ordinance 105462 is, as will be discussed hereinafter, because the matter came up for final consideration under New Business which is irrefutable proof of a procedural defect statutorily prohibited and mandated as void and of no effect under the Washington State Open Meetings Act (RCW 42.30.060), Seattle Ordinance 105462, and the ByLaws and Procedures for the Ballard Avenue Landmarks Board.

In the state complaint under both Factual Allegations and Claim Allegations and the federal complaint at page 2 paragraphs 5, 6, and 7 appellant clearly indicates lack of statutorily required prior notice of public hearings on applications for a certificate of approval involving the subject houses. The claims in question allege facts involving First, Fifth and Fourteenth Amendment deprivations.

The federal constitutional claims presented to the District Court via the complaint and by a motion for reconsideration and were reiterated before the Ninth Circuit Court of Appeals when argued and submitted on November 9, 1983. That Court affirmed the district court's holding that the doctrine of res judicata precludes litigation of claims one through eleven and fifteen.

REASONS FOR GRANTING THE WRIT

The underlying state court judgment sanctioning the procedure whereby a certificate of approval was issued for siting and remodeling the houses moved into the landmark commercially zoned district patently, clearly and irrefutably demonstrates from the record the absence of notice and opportunity to be heard required by courts as a matter of constitutional necessity.

From the inception of his suits, as evidenced by his complaints, appellant has steadfastly maintained that he never received notice required for "all" applications under Seattle Ordinance 105462 including the certificate of approval application in question. Even though the record does not contain any evidence of required notice, the state courts found ratification at the September 14th meeting as evidenced solely by the Minutes offered by the City (District Court Docket Entry 7 Exhibit A to the Affidavit of John Turnbull). How can action such as that taken in the Minutes of September 14, 1976 regarding the houses summarily constitute prior notice required under Seattle Ordinance 105462? The action taken and here relevant in the Minutes is mandated to be void under RCW 42.30.060 (commonly referred to as the Washington State Open Meetings Act) because the action came up for final action under New Business which by parliamentary definition and procedure is action taken without prior notice. The fact that the final action was taken on the certificate of approval application in the Minutes of September 14 under New Business constitutes admitted proof by the City in the record that appellant, as he has claimed throughout never had nor could have had notice required by Seattle Ordinance 105462.

Furthermore, because appellant signed a petition delivered in July 1976 to and accepted by the Director of the Seattle Department of Community Development requesting that the district board be convened to consider the application for a certificate of approval as required by Ordinance 105462, it is believed that a court should insist that appellant receive personal notice of action on the certificate of approval in question prior to the September 14, 1976 board meeting.

Appellant did not receive such or have any prior knowledge or notice of the June 3rd or September 14th consideration and or action upon the application for a certificate of approval in question.

The failure to follow the notice specifics of Seattle Ordinance 105462 not only invalidates the legal process leading to the issuance of the certificate of approval, but such failure mandates the September 14th action of ratification void under RCW 42.30.060. RCW 42.30.060 title "Ordinances, rules, resolutions, regulations, etc., to be adopted at public meetings—Notice" concludes "Any action taken at meetings failing to comply with the provisions of this section shall be *null and void*" (emphasis supplied). As will be shown below by the local district ByLaws—"2. All meetings of the Board shall be held in accordance with the Open Meetings Act of 1971 WRC sec. 42.30)".

Washington State case law as evidenced by the Washington State Supreme Court's holding in *Eastlake Coun.* v. *Roanoke Assoc.*, 82 Wn 2d 475, 513 P2d 36(1973) involving misconduct by the City of Seattle does not allow for curing such defect as here done by finding "ratification".

The underlying judgment upon which the res judicata ruling is based is void. The ratification and mootness finding of the Washington State Appeals Court is not in compliance with jurisdictional conditions imposed under RCW 42.30.060 and Seattle Ordinance 105462 regarding facts taken and given effect from the September 14th meeting. Judicial enforcement of administrative decisions regarding the validity of the certificate of approval for siting and remodeling the houses in question is prohibited by mandate of law because to do so is to give effect to that which by statute is declared null and void.

Any full faith and credit constraint thought to exist by the federal courts below under Article IV or 28 U.S.C. 1738 is negated by the absence of a valid state judgment upon which res judicata depends. (See *ALPA* v. *TI*, 567 F. Supp. 66 headnote 7 at pp. 72-3).

Title 28 U.S.C. 1738 can not be said to diminish a federal court's inherent power to review procedural compliance with

RCW 42.30.060, Seattle Ordinance 105462 and the ByLaws of that ordinance. Before applying res judicata it is incumbent for the federal court to inquire into the legality of any judgment or process by which judgment was obtained. A valid judgment is a prerequisite for res judicata. In addition, it is also incumbent, as appellant maintains did not here occur, to apply 28 U.S.C. 1738 correctly and legally. "Acts" (statutes and ordinances) are included in 28 U.S.C. 1738.

By overlooking, disregarding or failing to address RCW 42.30.060 as the controlling preclusion rule in the State of Washington the Circuit Court by its Memorandum has destroyed the purpose and provisions of RCW 42.30.060 herein relevant. By disregarding, not recognizing, addressing or extending full faith and credit to RCW 42.30.060 as required by Article IV, 28 U.S.C. 1738, and followed in 28 U.S.C. 1739 the Circuit Court has in effect overruled the validity and protections of RCW 42.30.060 as applied solely to appellant, but to no other person in the State of Washington. That raises an equal protection question under 28 U.S.C. 1738 application here.

The lower courts by their judgments have substituted their judgment regarding jurisdiction to render the underlying judgment which incorporates and gives effect to facts mandated as void under RCW 42.30.060 for that of the Washington State Legislature which enacted as substantive law RCW 42.30.060. The lower courts have created their own jurisdiction to render and or give effect to a Judgment where such is withdrawn from Washington State Courts and mandated null and void under RCW 42.30.060.

The state courts statutorily lacked the authority to render a decision of ratification and mootness based upon the evidence presented and relied upon. Ratification of a void act has no legal effect (See 16 C.J.S. secs. 422 and 428). Appellant never, as the record evidences by the Minutes, received required notice of action upon the application for the certificate of approval in question and no admissable evidence of notice exists in the record. How can recognition of the underlying state court

judgment shown to be void under Washington State Law be legally enforced by a federal court?

Seattle Ordinance 105462 sec. 4(b) specifies:

> (b) *The District Board shall* elect its own chairman and *adopt* in accordance with the Administrative Code (Ordinance 102228) *such rules of procedure as shall be necessary in the conduct of its business, including* (i) a code of ethics, (ii) *rules for reasonable notification of public hearings on applications for certificates of approval and applications for permits requiring certificates of approval in accordance with Section 5 hereof,* . . . . (emphasis supplied).

Though the certificate of approval in question was signed on June 3, 1976 and the so-called ratification is said to have occurred on September 14, 1976 it was not until May 4, 1978 that ByLaws and Procedures for the Ballard Avenue Landmarks Board were adopted and filed with the City Comptroller on May 23, 1978.

The text of the ByLaws and Procedures is part of the record below and is reproduced in part here and fully in the Appendix. It clearly shows the appearance of merit in appellant's position. Prior absence of the ByLaws is relevant.

ByLaws and Procedures for the Ballard Avenue Landmarks Board (Adopted at a Public Hearing on May 4, 1978)

Bylaws

1. The Board derives its authority and purpose from Seattle Ordinance 105462 (hereinafter referred to as the Ordinance) and is subject to the requirements of the Seattle Administrative Code.

2. All meetings of the Board shall be held in accordance with the Open Public Meetings Act of 1971 (WCR § 42.30).

3. Meetings of the Board shall be regularly held on the first Thursday of every month at 5:15 p.m. unless cancelled with the approval of the Chairperson. Additional meetings of the

Board shall be held upon the call of the Chairperson or at the request of three members of the Board.

4. The date, time, location and agenda for all meetings shall be released to local papers and posted at least five days in advance at the Ballard Community Service Center as well as the vicinity of the northern and southern boundaries of the District.

5. The Board shall elect a Chairperson and a Vice Chairperson each July for one-year terms.

6. Conduct of meetings shall be governed by *Robert's Rules of Order.*

7. A quorum for the conduct of any meeting of the Board shall be a majority of the current members of the Board.

8. A majority vote of Board members shall be required to approve an action of the Board. In case of a tie vote, the motion shall fail.

9. The Chairperson shall vote as any member of the Board.

10. The discussion on each application for a Certificate of Approval (hereinafter referred to as an Application) shall be preceded with a staff report unless waived by the Board. The staff report shall include any comments on the Application received by Board members not present, as well as a summary of past actions related to the Application and a report on how the proposed changes relate to the Guidelines for the District and National Register properties.

11. During the review of an Application the presiding officer shall solicit testimony both in favor and in opposition to the Application.

12. Before a vote is taken on an Application, the presiding officer shall ask if all members in attendance are informed of the matter of the vote and may poll each member for his or her opinion on the matter. A member may abstain from voting only if that member declares that there is a conflict of interest in their voting.

13. Voting shall be by show of hands and shall be recorded in the minutes.

14. There shall not be vote by proxy.

15. The action taken by the Board on an Application shall not be incompatible with the criteria established by both the District Guidelines and the Guidelines for Properties on the National Register as noted in the context of testimony presented at the meeting.

16. Items not listed on the formal agenda shall be discussed under New Business, however formal action on an Application shall not be made under New Business.

17. Committees established by the Board may include non-members, but committees may not act in lieu of official Board action.

18. In case of a conflict between these Bylaws and *Roberts Rules of Order*, these Bylaws shall take precedence.

Procedures

Staffing

Staffing of the Board shall be provided in accordance with Ordinance 105462 of the City of Seattle.

Offices and Information

Information concerning official business of the Board, Rules, Procedures and Guidelines may be obtained from the Ballard Community Service Center (5349 Ballard Avenue N.W., Seattle, Wa. 98107), or from the Board offices at the City of Seattle, Department of Community Development (400 Yesler Way, Seattle, Wa. 98104 625-4501).

Applicants are encouraged to consult informally with the Board staff prior to submittal of an application for a Certificate of Approval.

Processing of Applications

Applications for Certificates of Approval required under Ordinance 105462 shall be made by contacting the Board staff and filling out the application form. There shall be sufficient information to provide the Board with adequate materials for review and action. Such information may include scale drawings, color samples, a completed application for a Building Permit, and material samples.

Application blanks may be obtained from the Ballard Community Service Center or the Board offices.

Completed applications will be entered on the agenda for the next regular meeting allowing for reasonable notification of a public meeting.

The Court's attention is directed to paragraphs 1, 2, 4, 6, 11, 16 and the last sentence of the text reproduced above. Specific attention is directed to paragraph 16 as supportive of appellant's position and pivotal if not determinative of this appeal.

The Circuit Court at page 3 of its Memorandum cites the law of *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 398 (1981) as determinative of the preclusion rules of the State of Washington. The sentence quoted speaks to a "wrong" judgment. RCW 42.30.060 precludes a judgmental decision, right or wrong, such as that cited in the Federated case since the relevant controlling provision of RCW 42.30.060 deprives the state court from rendering the underlying judgment pleaded because the state court did not have jurisdiction of the subject matter of action taken regarding the certificate of approval at the September 14th meeting under RCW 42.30.060 and Seattle Ordinance 105462 since the September 14th meeting failed to comply with the notice provisions of RCW 42.30.060, Seattle Ordinance 105462 and the ByLaws and Procedures for the Ballard Avenue Landmarks Board (See Wa AGO 1971 No. 33 page 31 in Appendix).

An "erroneous conclusion" such as that in Federated at page 399 or an "erroneous view" was also impossible here since

no conclusion or view could be reached giving effect under RCW 42.30.060 as here occurred to that which is statutorily declared void by RCW 42.30.060.

The state court statutorily lacked the authority or jurisdiction under RCW 42.30.060 to render a judgment giving effect to relevant action taken at the September 14th meeting.

The federal courts fall into the same trap that the state courts did because the federal courts too fail to give full faith and credit to state substantive law RCW 42.30.060 which mandates the state judgment void because it gives effect and recognizes the September 14th meeting action declared void under RCW 42.30.060 (the Washington State Open Meetings Act).

Appellant fails to understand how that which is mandated substantively void can be resurrected, and the controlling statute disregarded. Absent lawful curing, which did not legally occur here, that which is void is void forever under the laws of the State of Washington (See *Eastlake Coun* v. *Roanoke Assoc.*, 82 Wn 2d 475, 513 P2d 36(1973)).

The federal courts lack jurisdiction to give effect to the state judgment because RCW 42.30.060 as the substantive law of the State of Washington denies to a state court jurisdiction to render a judgment violative of RCW 42.30.060. Any such jurisdiction to render judgment here under Washington State law is prohibited and statutorily declared void. Had the Washington State Legislature in enacting RCW 42.30.060 wanted prohibited action to be voidable it would have said so, but by its language it clearly did not, and knowingly, deliberately, and emphatically used and meant "void".

The lower federal courts rule on the meaning and or applicability of the substantive law of Washington State (RCW 42.30.060) in the first instance. The original forum has not determined the meaning and or applicability of the substantive law to the underlying state judgment as appellant reads the record.

The adequacy of the public hearing process involved in granting the certificate of approval is so patently procedurally

deficient as not to be recognized by a federal court in the wake of this Court's holding in the landmark historic preservation case, *Penn Central Transportation Co et. al* v. *New York City et al.*, 98 C Ct 2646, 438 US 104, 57 L Ed 2d 631(1978). As appellant reads the Penn Central case he comes away with the understanding that historic preservation legislation regarding a landmark district, site, or structure in New York City was reasonable and did not infringe upon constitutional guarantees because of the extent and degree of prior public participation in the designation therein involved. A substantial question is presented by the instant case which should be settled by this Court. Does public involvement and participation cease upon designation of a landmark district, site or structure? Appellant believes this Court would emphatically say "No", and insist upon continued public participation where called for and or allowed as the land use and historic preservation planning process evolves and unfolds as here via consideration and action upon the certificate of approval application for the houses here in question. Without notice, as here occurred, the standard of public involvement and participation believed required by this Court in *Penn Central*, supra, is not and can not continue to be met.

In addition, the failure by the City to provide notice and an opportunity to be heard at a public hearing such as that of September 14, 1976 impedes and defeats the purpose of the Act and Declaration of Congressional policy of the National Historic Preservation Act of 1966 (PL 89-665; 16 U.S.C. 470 as amended). Local historic preservation legislation such as Seattle Ordinance 105462 was enacted in furtherance of the National Historic Preservation Act.

The total absence of notice to appellant and appearance of the absence of testimony in opposition to the application allowed under paragraph 11 of the district ByLaws, as shown above, appears to not even reach the first rung of public participation. The procedure for consideration of the application for a certificate of approval at the September 14th meeting from the Minutes, aside from appellant's contention that such is statutorily void, was a sham. The facts alleged in the complaint depict just such a circumstance. The siting of the

houses into the district was a fait accompli. Other Seattle historic or special review districts were afforded the opportunity and procedures whereby they turned the siting of the houses down in their districts. The Ballard Avenue Landmark District was denied that opportunity and procedure guaranteed by and in accordance with Seattle Ordinance 105462. The houses' presence in the district was by fiat. The City flagrantly and unlawfully abused its power and disregarded the law. From the outset the City and Historic Seattle secretly embarked upon a scheme to dump the houses, unwanted by other historic or special review districts, in the Ballard Avenue Landmark District. The houses have no historical connection with the district. The houses were not legally protected as the historic district was under Seattle Ordinance 105462. The City clearly did what it wanted, law or no law.

RCW 42.30.010 Legislative declaration to Chapter 42.30 Open Public Meetings Act states:

> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Appellant's understanding of that declaration carries with it the right, denied appellant, to observe the ratification action said to have occurred at the September 14th meeting. The City failed to follow the specifics of law to validate the legal process here involved, absent notice, the opportunity to be heard and procedural compliance, i.e., the ByLaws, in acting upon the application for the certificate of approval in question.

By the enactment of Chapter 42.30 the Washington State Legislature has statutorily declared as policy with the force of law strict compliance and adherence with rules of procedure and conduct of the people's business by boards such as the district board here. The consequence of failure to abide by the Open Public Meetings Act is clear as shown by RCW 42.30.060.

Any notion, as the City has maintained in court, that appellant freely chose the state court as the forum to hear his federal constitutional claims, and that he is stuck with that choice loses sight of the fact that the state suit was filed prior to *Monell et al* v. *Dept of Soc'l Svcs of NYC*, 98 S Ct 2018(1978). Appellant had no choice but to submit the question of deprivation of First, Fifth and Fourteenth Amendment constitutional guarantees to a state court because prior to Monell the City was not a "person" for the purposes of federal court jurisdiction for a 42 U.S.C. 1983 claim. The fact that 42 U.S.C. 1983 is the codification of the 1871 Civil Rights Act is historical recognition that federal jurisdiction exists where as here state procedural grounds for disregarding federal claims falls below the requirements of due process. The state court at the urging of the City denied the opportunity for consideration of federal claims, and as has and or can be shown from the record was obliged to entertain properly presented federal claims.

Appellant met his basic duty under Washington State practice to present facts, including the absence of notice and opportunity to be heard, in his complaint giving rise to a cause of action. (See Wa Practice CR8(a) and sec. 5101 in Appendix hereto) That the City, at the very least, misled the court to render judgment and or the state courts failed to properly apply the law to facts presented in the complaint is not a consequence the failure of which appellant should be solely forced to bear. Appellant bears the cost of submission by the City of the Minutes of September 14th, and the receipt by and sanction of the Minutes by the state courts. The procedure in the presence of RCW 42.30.060, Seattle Ordinance 105462, and the ByLaws and Procedures for the Ballard Avenue Landmarks Board amounts to a state policy to violate and deprive appellant of his constitutional rights. Appellant, the victim, bears the costs and absorbs the consequential damage, including the substantial and continuing costs of damage mitigation, for actions by the City, Historic Seattle and Judges out of his control, and contrary to their oaths. The bearing of such costs is punishment for using the courts to regress deprivation of basic freedoms. Democracy ceases to exist in the absence of insistence upon the quintessential American ideal of accountability of government

entities and officials to abide by the law. Appellant abides by the law, and expects the City to do the same.

Without a valid underlying judgment res judicata can not exist or serve as a bar or an impairment to District Court original jurisdiction to provide a remedy for the constitutional deprivations alleged in the first eleven claims and claim fifteen of the complaint under 42 U.S.C. 1983.

What appellant seeks to accomplish rightfully preserves federal jurisdiction to hear the federal complaint rather than allowing glaring state court misconduct and assumptions of procedural compliance exist where in fact and law required notice and opportunity to be heard did not occur and never existed as evidenced by the record. Appellant seeks to accomplish what Congress intended with passage of 28 U.S.C. 1343, 42 U.S.C. 1983 and 42 U.S.C. 1985.

The Circuit Court Memorandum misconstrues appellant's appeal solely as an attempt to provide other legal theories for recovery and begs the question raised by appellant of lack of jurisdiction in the state court to render the underlying judgment under RCW 42.30.060, resulting in a void underlying judgment, and to which res judicata can not be applied.

Substantial First, Fifth and Fourteenth Amendment questions are raised on the record in this case. No constitutional interest of appellant was found to be at stake by the Washington State Appeals Court, which merely brushed aside constitutional claims by finding plaintiff lacked standing to bring his action, that appeal was untimely, and the cause was moot because ratification cured any defect in the prior decision. In lieu of a finding of lack of standing it is difficult to raise and argue state and federal constitutional deprivations alleged in the state complaint. The facts and circumstances involved in the instant case fall below standards set out by this Court and other federal courts in a series of cases, i.e., *Sierra Club* v. *Morton*, 405 US 727 (1972) and *Scenic Hudson Preservation Conf* v. *FPC*, 354 F2d 615-6(1965), recognizing a concern for protection of "orderly community planning" to be an affected protected interest. Standing tests are similarly discussed in a series of Washington State court cases, i.e., *Anderson* v. *Island*

Cy, 501 P2d 594(1972), *Loveless* v. *Yantis*, 513 P2d 1023(1973), *Byers* v. *Bd of Challam Cy Comm'ners*, 529 P2d 823(1974), *Save* v. *Bothell*, 576 P2d 401(1978), and *The Committee For Responsible Planning* vs. *Kitsap Cy and Winmar Co. Inc.*, King County Superior Court Judgment No. 79-2-01416-8 dated July 24, 1980, in which standing was found in a property owner, like appellant here, who owned property 2¼ miles from the subject property of that case, whereas in the case before this court plaintiff's property is 3 blocks from the subject two houses on the same business street within the Ballard Avenue Landmark District—the zone of interest.

Clearly, appellant was within the zone of interest elsewhere recognized by courts to raise First, Fifth and Fourteenth Amendment constitutional deprivation claims involved in procedural defects in the land use planning process by which action was taken upon the application for a certificate of approval in question at the September 14th board meeting.

Appellant has throughout these proceedings, i.e. detailed discussion appears in the Brief of Appellant before the State of Washington Court of Appeals in the Argument beginning at page 13, raised his contention of his inclusion within the zone of interest required for standing. Have we reached the point where legal standing is solely by corporate name, numbers in a class action or what legal firm's letterhead appears on a complaint? Appellant should not be treated as below the legal standing standard—he is an adversely affected "person" to which constitutional provisions apply.

Appellant will supply in the Appendix a copy of the State Court Appellate Brief referred to above for the Court. In addition, before the lower federal courts appellant urged that he met the standing test in his Request To Reconsider Motion at pages 10 and 11 (See District Court Civil Docket Entry #24).

Why should appellant not be protected in his First Amendment right to be present at the September 14th meeting, observe, hear what others say, and speak? That is what appellant and other signators sought to accomplish by signing, delivery, and receipt of the petition to the Director of the

Seattle Department of Community Development earlier referred to in this Statement. Without required notice of the consideration of the application at the September 14th meeting how could appellant exercise his First and Fifth Amendment rights? Other owners in real property in other historic and special review districts in Seattle or their elected representatives and or boards were lawfully afforded such an opportunity, and those districts turned down siting the houses in those districts prior to the clandestine signing and questioned issuance of a certificate of approval and movement(sic), orchestrated "dumping" of the houses, into the Ballard Avenue Landmark District. Such fact raises Fifth Amendment denial to appellant.

Without notice of action taken or knowledge of such action how could appellant timely appeal the September 14th action? When did the time start running so as to determine beyond which appeal could be brought? Where in the record is that specific date and to what or why does it apply? The state court's timeliness reasoning, applied to the facts in the record, escapes appellant absent required notice to trigger and cut off judicial review otherwise unquestionably within the statute of limitation.

Washington State has imposed its rulings in such a way as to subject appellant to the supreme civil penalty of a court of law—barring the right to proceed, present and prove his complaint at trial. Dismissal was with prejudice. True it may happen everyday, but it must be by valid legal process. Such a circumstance did not here occur. Throughout these proceedings the City has stonewalled the truth as to what happened to cover up its misconduct. Does the City fear what will be presented and proved at trial? Can the City legally stonewall that fear thereby preventing the truth from surfacing in a court of law regarding the City's flagrant and unlawful abuse of power.

Access to and use of the instituting civil suit, appeal and writ proceedings involved in this case raises a substantial question as to whether appellant is required under color of and by the legal process of the State of Washington and or as occurred here subsequently in a federal court to pay a fee in order to exercise his right to speak (See RCW 2.32.070 and Wa

R.A.P. 5.1(b) and 28 U.S.C. 1911, 28 U.S.C. 1913 and 28 U.S.C. 1914). The condition of paying a fee to file a suit, appeal and writ as a condition to exercise a federal constitutional guarantee amounts to a fee as a condition precedent to exercise, express, and or execute guaranteed First Amendment speech, assembly and petition rights for one who like appellant is not a pauper, and is comparable to a poll tax to vote, (See *Harper* v. *Va. State Bd of Elections*, 86 S Ct 1079(1966)) and additionally may conflict with RCW 42.30.040. Such a situation quells both the opportunity to exercise constitutional rights at the time and moment those rights can have an effect on the lawful operation and conduct of governmental action, and the opportunity for protection of his property under the Fifth Amendment.

Never mind that such filing fees are reimbursable to a successful party. Without paying to file appellant can not exercise his right to speak and protect his property. Unlike the City, appellant, who at this point is not a pauper, can not raise taxes when money is needed to file an appeal, manage and operate his property, incur and continue to incur expense in mitigating damages, have the opportunity to earn a livelihood from the proceeds of his labor and the investment in his property, including furtherance of the objectives of the National Historic Preservation Act of 1966, as amended (PL 89-665, 16 USC 470), embark upon new investment opportunities, and create a reserve to hire an attorney and pay legal expenses. Appellant appears pro se not because of the lack of merits in his claims, but because he can not afford costly legal fees and expenses and assume the consequences of those fees.

Granted that the use to which the filing fee revenue is applied may be for an administrative cost purpose, but the expenditure is none the less a condition to exercise and execute the constitutional guaranteed rights including notice and the opportunity to be heard. Perhaps the solution to the problem appellant calls in question is best resolved simply by the timing of fee requirement and or collection. If money thus expended can not be appropriated elsewhere from another source, then the filing fee should be collected as a consequence of the use of

the judicial system and not as a condition precedent to the free exercise of constitutional guarantees such as the First, Fifth and Fourteenth Amendment rights herein relevant. (See 14 C.J.S. 98) Expediency or greater certainty of collection can not be grounds for substitution of the constitutional guarantee to free access in the first instance to the exercise of constitutional guarantees and protections.

Have we reached the point in 1984 where the only way appellant can or will be allowed to speak in the State of Washington in protection of his constitutional rights before a governmental entity is to first pay the filing fee to perfect the appeal and then get damages for not being able to speak and assemble in the first place when such exercise could have served a useful purpose in furtherance of open government rather than being shut out by a clandestine and closed process? Damages may well be a poor substitute for the guaranteed basic freedom and right to speak and participate before a governmental entity. The victim is or can be punished.

Next appellant contends contrary to the Circuit Court's footnote 2 at page 6 of its Memorandum that the facts involved and mentioned in reasons 1, 2, 3 and 5 of his Motion To Vacate Judgment at pages 1-4 and 6-11 (District Court Civil Docket Entry #19) allege fraud upon the court with particularity. A thing concealed from appellant prior to filing of the memorandum in support of motion for the state summary judgment dismissal was that action was taken as shown from the Minutes of the September 14th meeting regarding the houses. Without notice of the consideration of the certificate of approval application, action there taken was unknown to appellant. What legal effect do the Minutes have when read in conjunction with Seattle Ordinance 105462 and RCW 42.30.060.

From the facts pleaded by appellant and the Motion To Vacate Judgment referred to above, it is not appellant who failed to uncover information (the law of the case, i.e., Ordinance 105462 and RCW 42.30.060), but the courts that failed to diligently uncover information concealed from them by appellees. Fraud was committed upon the court by appellees which prevented the court from applying the law on the books

as enacted (See headnote 4 *Costantini* v. *TWA* relied upon by the Ninth Circuit in its Memorandum).

This Court's attention is directed to a citation in *Timberlane Lbr. Co.* v. *Bank of America, N.T. & S.A.*, 549 F2d 597 (1976) from this Court's holding in *Poller* v. *CBS, Inc.*, 368 US 464, 472(1962) stating:

> Nevertheless, we note that the Supreme Court has expressed disapproval of summary disposition in this type of case:
>
> We believe that summary procedures should be used sparingly in complex antitrust litigation where motives and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice".

An analogy can easily be drawn and is reasonable and relevant between the facts and circumstances involved in the warning given in the Poller case and the type of case before this Court and the impropriety of summary judgment dismissal where the party alleged to be the wrongdoer may possess information the full knowledge of which can only be drawn out under oath with its judicial sanctions of witnesses including government officials on the witness stand. Summary judgment dismissal here prevented the opportunity for and use of the legitimate and elsewhere recognized technique and tactic—witnesses on the trial stand, which may best bring out and arrive at the truth from those involved in the conspiracy to deprive appellant of his constitutional rights regarding the scheme to move the houses into the district. Appellant continues to maintain, as he has on the record, that summary judgment dismissal was improper, and contrary to the generally accepted practice for the proper and rightful imposition of summary dismissal (See Washington Practice CR 56 Rules For Superior Court "1. Purpose and Application" and "8. Questions of Credibility" as authority for impropriety—reproduced in Appendix of this Petition).

In *Parkland Hosiery* v. *Shore*, 439 US 322(1979) at page 328, and cited at page 7 of the appellant's Motion For Relief (District Court Civil Docket Entry #19), is language demonstrative of the function and role of a federal court in the instant case. The court in the Parkland case at page 328 quotes an earlier United States Supreme Court which stated

> "Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard".

By this petition appellant seeks to put this Court on notice of the circumstances herein present so that it can perform its intended role as a guardian. It is not too late in 1984 for this Court to safeguard the techniques and tactics of trial practice in the presentation and proof of claims herein, and thereby safeguard the operation of government under law, not in disregard of law.

Appellant contends that this case is the civil equivalent of *Thompson* v. *City of Louisville*, 362 US 199, in that dismissal of the claims in question from the foregoing turns not on the sufficiency of the evidence, but on whether this dismissal rests upon any admissible evidence at all. The dismissals are totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clauses of the Fifth and Fourteenth Amendments (See *Garner* v. *Louisiana*, 368 US 157, 163). Appellant raises the point and intends to urge it if certiorari be granted.

From the record, the propriety and prejudice caused by raising a counterclaim that plaintiff's claims "are patently frivolous, vexatius, and constitute a willful and malicious abuse of process by plaintiff Frank Kustina", the questions of fraud upon the court in obtaining the underlying judgment, the existence of a full and fair opportunity to litigate, and the proper use of summary judgment dismissal procedures below in both the state and federal courts along with the other questions presented herein are special and important reasons for this Court to grant a review on writ of certiorari.

Respectfully submitted,

FRANK KUSTINA
5201 Ballard Ave. N.W.
Seattle, WA 98107
Appellant Pro se
206-789-2155

83-1548

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRANK KUSTINA, Appellant,

v.

THE CITY OF SEATTLE, and THE HISTORIC SEATTLE PRESERVATION and DEVELOPMENT AUTHORITY, Appellees.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT
(See page A-1 of PETITION for listing of Opinions of the Courts Below)

Frank Kustina
5201 Ballard Ave N. W.
Seattle, Wa 98107
206-789-2155
Appellant Pro se

APPENDIX

I. Opinions of the Courts Below
   - A. King Cy Superior Court dtd June 14, 1978
   - B. Court of Appeals of the State of Wa dtd Apr 9, 1979
   - C. Fed Dist Ct Order dtd Aug 11, 1980
   - D. Fed Dist Ct Order dtd June 10, 1981
   - E. Fed Dist Ct Order dtd Dec 10, 1981
   - F. Fed Dist Ct Order dtd Oct 1, 1982
   - G. Fed Dist Ct Order dtd Nov 24, 1982
   - H. 9th Cir Fed Ct of Appeals Order dtd Dec 14, 1983
   - I. 9th Cir Fed Ct of Appeals Order dtd Feb 2, 1984

II. Other Appended Materials
   - A. State Complaint
   - B. Federal Complaint
   - C. Brief of Appellant before the Wa State Appeals Court due to the cost of reproduction 1 copy is provided the Clerk and attached to original appendix only
   - D. Civil Docket Entry #19 Motion for Relief from Order
   - E. Civil Docket Entry #7 Exhibit A att'd to Affidavit of John Turnbull—MINUTES of Sept 14th meeting
   - F. Seattle Ordinance 105462
   - G. Wa AGO 1971 No. 33 page 31
   - H. ByLaws and Procedures for the Ballard Avenue Landmarks Board
   - I. Washington Practice Rules for Superior Court CR8(a) and sec. 5101
   - J. Washington Practice Rules for Superior Court CR 56
   - K. 16A C.J.S. 422, 428
   - L. 16 U.S.C. 470 Nat'l Historic Preservation Act
   - M. 28 U.S.C. 1254
   - N. 28 U.S.C. 1343
   - O. 28 U.S.C sections 1911, 1913, & 1914
   - P. 42 U.S.C. 1985(3)
   - Q. Constitution of Washington Art. 1, sections 2,3,4, & 32

APPELLANT DOES NOT HAVE FUNDS TO COMMERCIALLY PRINT THE APPENDIX ITEMS. THEY CAN BE PROVIDED ON 8½ x 11 PAPER AT NO ADDITIONAL COST.

IN QUESTION IS THE COST TO SPEAK UNDER THE FIRST AMENDMENT.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

FRANK KUSTINA,

Plaintiff,

vs.

HISTORIC SEATTLE PRESERVATION AND DEVELOPMENT AUTHORITY, a public corporation; THE CITY OF SEATTLE, a municipal corporation; PAUL SCHELL, JAMES HORNELL, ALFRED PETTY, each a former or present municipal official; GEORGE E. BENSON, TIM HILL, PAUL KRAABEL, PHYLLIS LAMPHERE, WAYNE D. LARKIN, JOHN R. MILLER, RANDY REVELLE, SAM SMITH, JEANETTE WILLIAMS, each a former or present municipal official; WES UHLMAN, a municipal official,

Defendants.

NO. 833 228

JUDGMENT OF DISMISSAL UNDER CR 12(b) and CR 56(b)

This matter having come on regularly for hearing before the undersigned Judge of the above-entitled court upon the motions of defendants for judgment dismissing plaintiff's complaint with prejudice pursuant to Cr 12(b) and CR 56(b); the court having reviewed

the pleadings, motions, affidavits, memoranda and other documents on file herein and having heard argument from counsel and from plaintiff, and it appearing to the court that plaintiff's complaint fails to set forth any claim upon which relief could be granted, that there is no genuine issue of material fact and that defendants' motions should be granted for the reason that plaintiff's action was brought beyond the 20 day time required by law, and is at any rate barred by principles of estoppel and laches, for the reason that plaintiff has not alleged, identified or sustained any legal injury, is not aggrieved and lacks standing, and for the reason that the uncontroverted affidavits on file herein establish that plaintiff's claims predicated upon Seattle Ordinance 105462 are without merit

as a matter of law and are at any rate moot; Now, Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's complaint is dismissed with prejudice and with costs to defendants.

DONE IN OPEN COURT this 14th (handwritten) day of June, 1978.

/s/ Jack Scholfield
JUDGE

Presented by:

/s/ Charles D. Brown
CHARLES D. BROWN
Of counsel for Defendants
Except Historic Seattle
Preservation & Development Authority

APPROVED FOR ENTRY

/s/ John J. Dystel
JOHN J. DYSTEL
Attorney for Historic Seattle Preservation and Development Authority

APPROVED AS TO FORM, NOTICE OF PRESENTATION WAIVED:

/s/ Frank Kustina
FRANK KUSTINA, Plaintiff

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRANK KUSTINA,

Appellant,

v.

HISTORIC SEATTLE PRESERVATION AND DEVELOPMENT AUTHORITY, a public corporation; THE CITY OF SEATTLE, a municipal corporation; PAUL SCHELL, JAMES HORNELL, ALFRED PETTY, each a former or present municipal official; GEORGE E. BENSON, TIM HILL, PAUL KRAABEL, PHYLLIS LAMPHERE, WAYNE D. LARKIN, JOHN R. MILLER, RANDY REVELLE, SAM SMITH, JEANETTE WILLIAMS, each a former or present municipal official; WES UHLMAN, a municipal official,

Respondents.

NO. 6698-I

DIVISION ONE Filed: Apr 9, 1979

DORE, FRED, J. --Plaintiff alleged that he was the owner of property in Ballard, and he brought this action against the Ballard Avenue Landmark District demanding the removal of two small historic residential houses that Historic Seattle Preservation and Development Authority(Historic Seattle) had acquired, renovated and moved to

their present location in Ballard. Along with Historic Seattle, plaintiff's complaint named as defendants the City of Seattle, the former director of Seattle's Department of Community Development, the acting director of that department, the Superintendent of Buildings for the City of Seattle, all members of the Seattle City Council, and Seattle's former mayor. The court granted the defendants' motion for summary judgment of dismissal. Plaintiff appeals.

ISSUES

1. Did the trial court err in holding that plaintiff had no standing to challenge the administrative actions of Historic Seattle Preservation and Development Authority?

2. Did the court err in holding that plaintiff's petition for writ of

certiorari was untimely?

3. Did the trial court err in holding that plaintiff's complaint coupled with the uncontroverted affidavits before the court, failed to set forth a viable claim upon which relief could be granted?

STATEMENT OF FACTS

Historic Seattle is a public authority chartered by the City of Seattle, pursuant to RCW 35.21.725 and Seattle Ordinance 103387. Historic Seattle's charter states that the public authority's purpose is to preserve and enhance the historic heritage of the City of Seattle for the mutual pride and enjoyment of Seattle's citizens and for the creation of a more livable environment within the historic areas of the city.

On October 15, 1976, the Ballard

Avenue Landmark District (Seattle Ordinance 105462) was created to preserve, protect, enhance, and perpetuate those elements of the district's cultural, social, economic, architectural, historic or other heritage. The ordinance prohibited certain changes in the buildings, structures and other visible property therein without a certificate of approval. The ordinance further established a board consisting of 5-7 members to be elected, which would administer and enforce the ordinance. Upon application for a certificate of approval, the ordinance provided that the board act to review the application and grant or deny the same within 30 days. If the board failed to act within the 30-day limit, the application would be deemed approved and the director of the Department of

Community Development would thereafter issue a certificate of approval.

In May of 1976, Historic Seattle acquired two of Seattle's oldest residential houses, the "Pioneer Houses." The Pioneer Houses were in danger of being demolished as the result of commercial development in Seattle's International District, and Historic Seattle acquired the houses for the purpose of relocating and renovating them in order to preserve an important part of Seattle's heritage.

Earl Layman of Historic Seattle stated in his affidavit in reference to the two Pioneer Houses as follows:

> The (pioneer) houses are among the oldest structures still existing in the city. Modest single-family structures of this type once existed in considerable numbers along Ballard Avenue in what is now the Landmark District . . .(The pioneer houses) preserve and enhance

> the District's cultural, historic and architectural heritage by providing a unique example of a type of structure that once was common on Ballard Avenue.

Historic Seattle thereafter sought to relocate the houses to the Ballard Avenue Landmark District, created in April of 1976, pursuant to Seattle City Ordinance 105462. On May 26, 1976, pursuant to Ordinance 105462, Historic Seattle applied for a certificate of approval of Historic Seattle's proposal to relocate the Pioneer Houses to the Ballard Avenue Landmark District. At that time the Ballard Avenue Landmark District Board created by Ordinance 105462 had not yet been elected. That board's members were not elected until July of 1976.

Section 5(d) of Ordinance 105462 requires that the director of Seattle's Department of Community Development

unilaterally act upon an application for a certificate of approval if the Ballard Avenue Landmark District Board does not act upon that application within 30 days from the date the application is submitted. Because the Ballard Avenue Landmark District Board did not act, and could not have acted, upon Historic Seattle's application for a certificate of approval within 30 days from Historic Seattle's submission of that application, the director of Seattle's Department of Community Development, acting under the requirements of the ordinance, issued Historic Seattle a certificate of approval on June 3, 1976. In August of 1976, the City of Seattle issued a building permit to Historic Seattle pursuant to Historic Seattle's July 21, 1976 application for such a building permit to allow the

relocation of the Pioneer Houses to the Ballard Avenue Landmark District. Historic Seattle moved the Pioneer Houses to the Ballard Avenue Landmark District on September 27, 1976.

Although Historic Seattle's plan to relocate the Pioneer Houses had been amply publicized in various Ballard publications prior to September 27, 1976, and even though the plaintiff was well aware of the relocation plans well before the relocation of the Pioneer Houses, he took no action whatsoever to contest Historic Seattle's relocation of the houses until August of 1977, almost one year after the Pioneer Houses had actually been relocated in Ballard. As soon as the Ballard Avenue Landmark District Board had elected and appointed the various members of their board, the composition of which was completed after

Historic Seattle had received its building permit to relocate the Pioneer Houses, the board endorsed the relocation of the houses before they were actually moved to their present Ballard site.

Plaintiff admits that he learned of Historic Seattle's plan to relocate the Pioneer Houses to the Ballard Avenue Landmark District on June 14, 1976, and he also attended a public hearing on such proposal on July 27, 1976, which hearing was held to afford Ballard residents an opportunity to comment upon Historic Seattle's plan to relocate the Pioneer Houses.

DECISION

ISSUE 1: Plaintiff lacked standing to bring this action.

Since Ordinance 105462 does not authorize appellant's present action, such action is necessarily one pursuant

to RCW 7.16.040 for a writ of certiorari to review both the issuance of a certificate of approval by the director of Seattle's Department of Community Development and the issuance of a building permit by Seattle's Superintendent of Buildings.

However, an action for a writ of certiorari may only be maintained by one claiming to be "aggrieved" by administrative or judicial action. Jones v. Jones, 68 Wn. 2d 413, 415, 413 P2d 338 (1966). The courts have consistently held that in order to be "aggrieved" for purposes of standing to challenge administrative actions, a plaintiff "must allege and prove that he has suffered some special damages not common to other property owners similarly situated." See Unger v. Forest Homes T.P., 237 N.W. 2d 582, 584 (Mich. App. 1975), where the

court held that plaintiff lacked standing to challenge an amendment to a municipality's zoning ordinance because the plaintiff had failed to establish that he had "suffered a special damage by reason of the change in the use or zoning--different from that suffered by the general public." See also Whitney Theater Co. v. Zoning Board of Appeals, 189 A. 2d 396, 399 (Conn. 1963), where the court held that a plaintiff in an action to review the decision of a municipal zoning board "had the burden of proving that it was aggrieved" which "required the plaintiff to establish that it was specially and injuriously affected in its property rights or other legal rights."

In the present case, appellant has alleged no such special damage resulting to him from Seattle's actions that

permitted Historic Seattle to relocate the Pioneer Houses from Seattle's International District to Ballard. Appellant has alleged only that he is the owner of property in Ballard, and such an allegation is insufficient to afford appellant standing.

Consequently the lower court properly held that plaintiff had no standing to challenge the certificate of approval and building permit issued to Historic Seattle for the relocation of the Pioneer Houses.

ISSUE 2: Appeal untimely.

The trial court's ruling must be affirmed for the additional reason that the plaintiff's appeal was not timely. Petitions for writs of certiorari to review administrative actions must be filed within 20 days from the contested administrative action just as appeals to

Superior Court from decisions of courts of limited jurisdiction must be filed within 20 days.

In the present case, no statute or ordinance gave appellant the right to challenge the administrative actions at issue here. Appellant's complaint is necessarily one seeking a writ of certiorari to review administrative actions. Because appellant's complaint was brought one year from the administrative actions of which he complains, and not within 20 days, the lower court properly dismissed that complaint pursuant to Vance v. Seattle, 18 Wn. App. 418, 569 P. 2d 1194 (1977). Moreover, even if Ordinance 105462 had authorized appellant's appeal, which it does not, that ordinance requires that such appeals be taken within 20 days. Thus, whether appellant's action is one for a writ of

certiorari or one taken pursuant to Seattle City Ordinance 105462, the lower court properly ruled that appellant's action was time-barred.

ISSUE 3: Plaintiff's cause of action moot.

Even assuming the validity of plaintiff's claim, such claims are entirely moot. It is undisputed that once the board's elections were held and the board became operational, and reviewed the project in question, they unanimously endorsed it and approved the issuance of the certificate of approval. Such ratification cured any defect in the prior decision. Owings v. Olympia, 88 Wash. 289, 152 P. 1019(1915).

Affirmed.

/s/ Dore, Fred

WE CONCUR:

/s/ Farris, J.

/s/ Swanson, H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK KUSTINA,
Plaintiff,
vs.

THE CITY OF SEATTLE and THE HISTORIC SEATTLE PRESERVATION BOARD AND DEVELOPMENT AUTHORITY,
Defendants.

No. C80-529V

ORDER ON MOTION TO DISMISS

Having considered the motion of defendants to dismiss, together with the memoranda and affidavits submitted by counsel, the Court now finds and rules as follows:

1. Although styled a motion to dismiss for failure to state a claim upon which relief can be granted, defendants' motion is actually one for summary judgment of dismissal. Both parties have treated the motion as one for summary judgment by submitting affidavits and documents outside the

record in support of their positions. The Court will therefore treat the motion as being one for summary judgment.

2. With respect to plaintiff's first eleven causes of action, it is clear that prior state court proceedings bar the assertion of those claims in this Court. Title 28 U.S.C. 1738; Scoggin v. Schrunk, 522 F. 2d 436 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Dennun v. Board of Governors, 413 F. Supp. 1274 (D.N.J. 1976); Seattle-First National Bank v. Kawachi, 91 Wn. 2d 223, 588 P. 2d 725(1978). Society has a substantial interest in the finality of litigation. Once a matter has been litigated, it is wasteful of both public and private resources to re-litigate the same matter. If plaintiff desired to have a federal court rule on his claims, he should have

sought certiorari before the United States Supreme Court. In any event, the Court has reviewed the prior rulings of the state courts and is in agreement with those rulings.

3. None of the remaining claims implicate the Historic Seattle Preservation and Development Authority in any way. To the extent that those claims attempt to impose liability upon the Authority, they do not state a claim upon which relief can be granted.

Accordingly, the motion of defendants is GRANTED in part and DENIED in part. The Historic Seattle Preservation Board and Development Authority is dismissed as a party defendant. The first eleven claims against defendant City of Seattle are DISMISSED WITH PREJUDICE.

The Clerk of this Court is

instructed to send uncertified copies of this order to all counsel of record.

The Clerk shall prepare a judgment of dismissal with prejudice with respect to defendant Authority.

DATED this 11th (handwritten) day of August, 1980.

/s/ Donald S. Voorhees
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK KUSTINA,
Plaintiff,
vs.

THE CITY OF SEATTLE; and THE HISTORIC SEATTLE PRESERVATION BOARD AND DEVELOPMENT AUTHORITY,
Defendants.

No. C80-529V

ORDER

Having considered plaintiff's motion to vacate and set aside this Court's order of August 11, 1980, together with the memoranda and affidavits filed by counsel, the Court finds that good cause has not been shown as to why that order should be vacated and set aside.

Accordingly, plaintiff's motion is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to the plaintiff and to all counsel of record.

DATED this 10 (handwritten) day of June, 1981.

/s/ Donald S. Voorhees
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK KUSTURA,
Plaintiff,
v.

THE CITY OF SEATTLE, and THE HISTORIC SEATTLE PRESERVATION BOARD AND DEVELOPMENT AUTHORITY,
Defendants.

No. C80-529C

ORDER

Having considered plaintiff's motion for reconsideration of the Court's denial of plaintiff's motion to vacate and set aside this Court's order of August 11, 1980, together with the memoranda filed by counsel, the Court finds and reaffirms that good cause has not been shown as to why that order should be vacated and set aside.

Accordingly, plaintiff's motion is DENIED.

The Clerk of this Court is

instructed to send uncertified copies of this order to the plaintiff and to all counsel of record.

DATED this 10 (handwritten) day of December, 1981.

/s/ Donald S. Voorhees
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK KUSTINA,
Plaintiff,
vs.

THE CITY OF SEATTLE,
Defendant.

NO. C80-5?9C

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THESE MATTERS come on for consideration on the motion of plaintiff Frank Kustina for reconsideration of the Court's earlier Orders dismissing his first twelve claims and on the motion of defendant City of Seattle for summary judgment. Oral argument was not requested by either party. The Court now finds and rules as follows:

1. Plaintiff's motion for reconsideration is DENIED. The Court further notes that after considering the

facts in the light most favorable to the plaintiff, his twelfth claim does not state a claim under 42 U.S.C. 1983.

2. Defendant's motion for summary judgment is GRANTED. RCW 70.93 et seq. does not provide plaintiff with a right to sue the City of Seattle for having an insufficient number of litter receptacles in the Ballard Avenue Landmark District. First, considering the legislative history of the Model Litter Control and Recycling Act, it is unlikely municipalities were intended to be sued under the statute. Second, since the City is not the property owner within the relevant area, it has not offended the statute even if it is applicable. Finally, even if the statute was violated, the duty was not one owed to the plaintiff so as to warrant suit. See Baerlein v. State of Washington,

92 Wn 2d 229 (1979).

3. Plaintiff's fourteenth claim is similarly without support. Considering the precatory language of the Adams Neighborhood Improvement Plan and the total lack of any facts to support a conclusion that the City acted arbitrarily and capriciously in not encouraging parking on City rights-of-way, defendant is entitled to judgment. See Barrie v. Kitsap County, 93 Wn 2d 843 (1980).

4. Claim fifteen must be dismissed for two reasons: First, to the extent it seeks to challenge the City's alleged noncompliance with Ordinance 105462, it is res judicata. Second, to the extent plaintiff claims that his own certificate of approval was improperly handled, plaintiff has failed to exhaust the

administrative remedies created by the ordinance. No evidence has been provided which would warrant an exception to the exhaustion requirement.

For the above stated reasons, plaintiff's motion for reconsideration is DENIED and defendant's motion for summary judgment is GRANTED.

The Clerk of this Court is instructed to enter Judgment accordingly and to send uncertified copies of this Order and of the Judgment to plaintiff, appearing pro se herein, and to counsel for the defendant.

DATED this 1st (handwritten) day of October, 1982.

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK KUSTINA, Plaintiff, NO. C80-529C

vs. ORDER

THE CITY OF SEATTLE, Defendant.

THESE MATTERS come on for consideration on the motions of plaintiff Frank Kustina for leave to amend his complaint and add additional parties and for reconsideration of the Court's Order denying his motion for reconsideration and granting defendant's motion for summary judgment. The Court cannot consider these motions. On October 26, 1982, plaintiff filed his notice of appeal. Once a notice of appeal is filed, jurisdiction is vested in the Court of Appeals, and the District Court has no power to modify its judgments. See Matter of Visioneering Construction, 661 F. 2d 119, 124 n.6

(9th Cir. 1981); Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 (9th Cir. 1981).

The motions are therefore STRICKEN as the Court is without power to consider them.

The Clerk of this Court is instructed to send uncertified copies of this Order to plaintiff, appearing pro se herein, and to counsel for the defendant.

DATED this 24th(handwritten) day of November, 1982.

/s/John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed Dec 14, 1983

FRANK KUSTINA,
Plaintiff-Appellant,

vs.

CITY OF SEATTLE,
Defendant-Appellee.

No. 82-3603

D.C. No. CV 80-519JCT

MEMORANDUM

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

Appeal for the United States District Court for the Western District of Washington (Seattle) Honorable John C. Coughenour, Presiding

Argued and Submitted November 9, 1983

Before: SNEED, NELSON, and REINHARDT, Circuit Judges

Plaintiff Frank Kustina filed an action against the City of Seattle under

42 U.S.C. 1983 (Supp. V 1981) and under Washington state law. The district court held that the doctrine of res judicata precluded litigation of twelve of the fifteen claims. In addition, the district court dismissed another cause of action for failure to state a claim upon which relief can be granted and granted summary judgment for the City of Seattle on the merits of two state law claims. We affirm in part and reverse in part.

RES JUDICATA

When a section 1983 action is based on the same wrong that was the subject of a state court action between the same parties and the preclusion rules of the state in question would bar litigation of those issues the doctrine of res judicata precludes a federal court from deciding whether

other legal theories would allow for recovery. See Allen v. McCurry, 449 U.S. 90, 96 (1980); Heath v. Cleary, 708 F. 2d 1376, 1379 (9th Cir. 1983); Migdal v. Superior Court, 703 F. 2d 332, 336 (9th Cir. 1983); Scoggin v. Schrunk, 522 F. 2d 436, 437 (9th Cir.), cert. denied, 423 U.S. 1066 (1976); see also 28 U.S.C. 1738 (1976) (requiring federal courts to give full faith and credit to state court judgments). In short,

> where the federal constitutional claim is based on the same asserted wrong as was the subject of the state action, and where the parties are the same, res judicata will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgment on the merits serves not only to bar every claim that was raised in the state court but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief.

Scoggin, 522 F. 2d at 437 (emphasis added). 1/

Under Washington law, all possible challenges to a common nucleus of operative facts are treated as if they had been decided in a final judgment whether or not the theories actually were raised in the proceedings. See Seattle-First National Bank v. Kawachi, 91 Wash. 2d 223, 226-28, 588 P. 2d 725, 728 (1978); Sanwick v. Puget Sound Title Insurance Co., 70 Wash. 2d 438, 441-42, 423 P. 2d 624, 627 (1967). Here, the plaintiff originally brought an action against the City of Seattle in state court challenging the placement of two houses in a district zoned for landmarks and the Seattle ordinance creating that district, on federal and state law grounds. Claims one through eleven and fifteen of the complaint

filed in federal court challenge the same conduct of the same defendant and the same ordinance. Therefore, even if the state court "judgment may have been wrong or rested on a legal principle subsequently overruled in another case," the doctrine of res judicata bars litigation of these issues once again. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (citations omitted).2/ We therefore affirm the district court's holding that that the doctrine of res judicata precludes litigation of claims one through eleven and fifteen.

FAILURE TO STATE A CLAIM

The plaintiff's twelfth claim is that the improper use of public funds jeopardized the future receipt of federal funds within the landmark district and violated state and federal law. The

speculative allegation indicates only a general concern shared by other property owners within the district, rather than any threatened or actual individual injury. Because a generalized grievance brought by a taxpayer and shared by a large class of citizens does not alone warrant the exercise of federal jurisdiction, and because the plaintiff failed to plead any individual injury, the assertion of federal jurisdiction over the twelfth claim would have been improper. See Warth v. Seldin, 422 U.S. 490, 499 (1975). To the extent that the twelfth claim raised state law issues, those parts of the claim should have been dismissed without prejudice after dismissal of the federal claims. See pp. ___ infra. Accordingly, we hold that the district court properly dismissed the claim.

STATE LAW CLAIMS

The district court exercised pendent jurisdiction over the state issues raised in claims thirteen and fourteen. In cases in which a federal court exercises pendent jurisdiction over state claims, "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (emphasis added). Here, the district court, rather than granting summary judgment on the merits, should have dismissed without prejudice the complex state law claims after the federal claims were dismissed. See Brandwein v. California Board of Osteopathic Examiners, 708 F. 2d 1466, 1475 (9th Cir. 1983) (citing United Mine Workers v. Gibbs);

Townsend v. Columbia Operations, 667 F. 2d 844, 850 (9th Cir. 1982). We therefore reverse the district court's summary judgment on the state law issues raised in claims thirteen and fourteen and remand the case with instructions to dismiss the claims without prejudice.

AFFIRMED IN PART, REVERSED IN PART

FOOTNOTES

1/ In deciding whether the doctrine of res judicata precludes litigation of a claim, a federal court generally would consider

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Harris v. Jacobs, 621 F. 2d 341, 343 (9th Cir. 1980) (citation omitted); see Rutledge v. Arizona Board of Regents, 660 F. 2d 1345, 1351 (9th Cir. 1981); Gallegher v. Frye, 631 F. 2d 127,128-29 (9th Cir. 1980).

2/ The plaintiff alleges that res judicata should not bar litigation of his claims because the defendants perpetrated fraud upon the state courts. We previously have reserved the question whether there is a fraud exception to the doctrine of res judicata. See Costantini v. Trans World Airlines, 681 F. 2d 1199, 1202 (9th Cir.), cert. denied, 103 S. Ct. 570 (1982). However, we have emphasized that, even if such an exception exists, a party must allege fraud with particularity. 681 F. 2d at 1202-03. We hold that the plaintiff's conclusory allegations of fraud are insufficient to fall within a proposed exception to the doctrine of res judicata.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK KUSTINA,
Plaintiff-Appellant,

vs.

Filed Feb 2, 1984

CITY OF SEATTLE,
Defendant-Appellee.

NO. 82-3603

Western District of Washington
(Seattle)

ORDER

Before: SNEED, NELSON, and REINHARDT,
Circuit Judges

Plaintiff's motion to file a late petition for rehearing with suggestion for rehearing en banc is granted.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a

vote on the suggestion. Fred. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NO. 83-1548

IN THE SUPREME COURT

of the

UNITED STATES

October Term 1983

FRANK KUSTINA,
Appellant,

v.

THE CITY OF SEATTLE,
and THE HISTORIC SEATTLE PRESERVATION
and DEVELOPMENT AUTHORITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

DOUGLAS N. JEWETT
City Attorney

GORDON F. CRANDALL
Assistant

Attorneys for
Respondents

Office and P.O. Address:
10th Floor, Seattle Municipal Bldg.
Seattle, WA 98104
Telephone: (206) 625-2270

SUNRISE PRINTING - SEATTLE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

FRANK KUSTINA,
Appellant,

v.

THE CITY OF SEATTLE,
and THE HISTORIC SEATTLE PRESERVATION
and DEVELOPMENT AUTHORITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

Respondent, City of Seattle, represents to the Court as follows:

1) The above-entitled cause was argued and submitted on November 9, 1983 and judgment entered on December 14, 1983 by the United States Court of Appeals for the Ninth Circuit.

2) The court of appeals: affirmed the district court's dismissal of twelve of appellant's fifteen causes of action as barred by the doctrine of res judicata;

affirmed the dismissal of one cause of action for failure to state a claim; and ordered that two state law causes of action be dismissed without prejudice for lack of pendent jurisdiction.

3) In his petition for writ of certiorari, appellant does not dispute any of the circuit court's reasons for affirming the dismissal of any of his causes of action. Instead, he asserts that as a matter of state law, the state court decisions are void and should therefore be given no res judicata effect. This issue was not raised in the district court and was not briefed on appeal but was first raised by appellant during oral argument on appeal. The court of appeals properly refused to consider the argument and limited its review to the issues decided by the district court. Furthermore, the effect to be given a state statute (Section 42.30.010 of the Revised Code of

Washington) involves no federal question and absent pendent jurisdiction, cannot be considered by the federal courts. Supreme Court review of a purely state law issue not considered by either the district court or the court of appeals is plainly inappropriate.

Petitioner's application for writ of certiorari is, therefore, not meritorious on its face and should be denied.

Respectfully submitted,

DOUGLAS N. JEWETT
City Attorney

GORDON F. CRANDALL
Assistant

Attorneys for
Respondents